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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 60

DICK GREGORY, et al.,

Defendants-Appellants,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Plaintiff-Appellee.

REPLY BRIEF FOR APPELLANTS.

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Defendants file this reply brief to clarify the issues and the record, in response to the answer of the City, and to emphasize why this case should be reversed.

I.

In this case the City agrees that the demonstrators were peaceful, never threatening, or seeking to provoke violence. And the City says (Br. 33) that no peaceful demonstrations will be terminated because of a hostile crowd. Why then does the City say that the demonstrators here were arrested and convicted?

A. The City argues that the choice of forum was "egregious", that the nature of the demonstration and the mere "presence" of the demonstrators was provoking, and that the spectators were a "captive" audience.

Under the City's theory the Mayor's neighbors own the public ways that pass through their neighborhood, and the neighborhood is "invaded" when those who do not live in the neighborhood use those public ways, particularly if they do so to communicate anything that is unpopular to the residents. However, this Court held in *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939) that streets and parks "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." The Court below rejected (App. 3a) the residential picketing argument, and the labor cases cited by the City do not apply to demonstrations on public issues.*

The City appears to be less than sincere when it argues (City's Br. 17) that the demonstrators had alternative choice of forums, including the Chicago Civic Center Plaza, see *People of the State of Illinois* v. *Riordan*, No. 41344, pending in the Illinois Supreme

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* Labor picketing is considered to involve private disputes between labor and management, and these cases do not apply to demonstrations on public issues in a public forum, *Duplex* v. *Deering*, 254 U.S. 443, 488, *Int'l. Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284, 393, concurring opinion of Frankfurter, J., *Niemotko* v. *Maryland*, 340 U.S. 268, 276, and Illinois follows this distinction, *Austin Congress Corp.* v. *Mannina*, 46 Ill. App. 2d 192, 202-203, 196 N.E. 2d 33. Note Kalven, *The Negro and The First Amendment*, 1965, p. 3, "I go along with Mr. Justice Frankfurter's judgment in *Niemotko* that the picketing cases, although 'logically relevant' are set apart by the different 'economic and social interests' they involve." See *Wilson* v. 1621, *Inc.*, 402 Pa. 94, 108, 1666 A. 2d 271, upholding the right to picket in residential neighborhood by citizens seeking revocation of a tavern license.

Court on an appeal *inter alia* from a conviction for criminal trespass for conducting a vigil in the Plaza, on the theory that the area is private property. But whether or not the Plaza was open to these demonstrators, it is their choice as to what public forum they wish to use, see the *Wolin* case, certiorari denied, 37 U.S. Law Week 3177, November 12, 1968, to the Port Authority that argued against the choice of its public facilities as a proper place for a peaceful demonstration.

The City attempts to make it appear that the spectators were a captive audience, as though that would justify the arrest of the defendants. But the record shows (City's Br. 2) that there were only twenty five spectators when the demonstrators arrived, that some 1200 to 1400 residents elected to leave their homes and come and join in the hostilities to the demonstrators. These were not captives, see *Saia* v. *New York*, 334 U.S. 558, 562.

As for the nature of the demonstration, it was made up of peaceful people who did not live in the neighborhood, some of whom were black. The City claims their mere presence was provoking. This confuses provocation, which is an invitation to disorder and may sustain a conviction for disorderly conduct, *Feiner*, with free speech, which by its nature may cause dissent and debate, *Terminiello*. When did anyone ever preach conversion to a group of believers? On the City's theory unpopularity justifies suppression (note Commander Pierson's statement to defendant Gregory, (R. 552, 568), that the continued presence of the demonstrators was provocation in and of itself, causing him to arrest them). However, under the first amendment, peaceful unpopularity must be tolerated, even by the residents in this case.

B. The City also argues that the grant of police protection was conditional, to be withdrawn when the message of the marchers became "of dubious societal value" as a result of the increasing threats and violence of the spectators and hecklers.

The City appears to suggest a sliding scale of free speech: if the crowd becomes hostile because of free speech activity, the police will know that the societal value of the demonstrators has diminished, and the police may withdraw protection and arrest the demonstrators and curb an otherwise lawful demonstration.

The City makes this argument in the face of a record that shows no attempt by the police to disperse the crowd, and the City does not dispute the record where it shows that the spectators who violated police orders and who broke police lines were merely thrown back by the police into the crowd.

On the City's theory the police were able to judge that the same message that had sufficient societal value to be protected by the police as free speech one minute, lost that value the next, coincident with the increased unprovoked threat and violence of the spectators. This argument is based on the unsupported assumption that *Cox* and *Edwards* would have been decided differently if the crowds there had acted illegally and violently, and as though *Brown* and *Wright* would have been decided differently if the public had stoned those who wanted to use the public library or the public park facilities.

The City balks at the term "heckler's veto", but the arguments it raises actually define the power in the heckler to cause the police to veto protected conduct,

by acting solely in response to one side of the controversy. In another context, this Court recently struck down such restraint *Carroll v. Pres. and Commrs. of Princes Anne,* (11/19/68) 37 Law Week 4041, even though (4041) the Court recognized that the speech involved was provoking, on the ground (4043) that self help by the police, just like *ex parte* court decisions, that restrain free speech are invalid.

II.

The City (p. 28) relies heavily on the *Winters* case, but fails to note that the ordinance in that case was struck down because unconstitutionally vague, and that *Winters* stands for the rule, for which it is cited in *Scull* v. *Virginia,* 359 U.S. 344, at 353 (1958), that

> "Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for violating an unclear law. *Winters* v. *New York.*"

The City (p. 28) claims that the Illinois court has "in a series of cases placed a narrow construction on the Chicago ordinance," but in *Hunt, Terminiello**, and *Joyce*** no such construction was given, and the interpretation in this case permitted petitioners' conviction for their mere presence" ("Your presence could

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* City (p. 31) attempts to minimize *Terminiello* but that case was relied upon by this Court in invalidating disorderly conduct ordinances in *Edwards* and *Cox,* and the trial court's charge in *Terminiello* was no more broad than the language of the ordinance itself which was charged to the jury in the instant case.

** *Joyce* (p. 29) may be distinguished as "hardcore disorderly" where the conduct itself is inherent notice of the violation *Hunt,* and the accused may not raise the vagueness and overbreadth of the statute, *Woodward.*

cause a riot" R. 568, 552) even though "participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence" *Brown,* and, by City's own admission (p. 33) "the [Chicago] ordinance shall not be used to stop a peaceful demonstration merely because of the reaction of a hostile crowd."

The vagueness of the ordinance as written or interpreted vests too much discretion in the police and permitted defendants to be convicted for protected First Amendment conduct without fair notice required, *Winters,* and without standards necessary for due process of law, *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, at 92 (1965).

III.

The City allowed the demonstrators to march without a parade permit from Buckingham Fountain to City Hall and then to the area of 35th and Lowe, and never charged the demonstrators with violation of the parade permit ordinance, Section 36-31. Now, the City seeks to show disorderly conduct by lack of a permit, but that is a separate offense, not relevant here. It is clear from the face of the parade permit ordinance that it lacks standards and is void for vagueness. Apparently this is why the City never chose to charge the defendants with marching without a permit.*

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* Section 36-31 of the Municipal Code of Chicago reads:

No parade shall be allowed on any public way, nor shall any open-air public meeting be held in or upon any ground abutting upon any public way, until a permit in writing therefor shall

CONCLUSION.

The City has failed to support the conviction. For the reasons set out above this Court should strike down the Chicago ordinance on disorderly conduct, and reverse.

Respectfully submitted,

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first be obtained from the department of streets and sanitation. Application to conduct such parade or procession or open-air meeting shall be made in writing to the commissioner of streets and sanitation at least thirty days prior to the event, by the persons in charge or control thereof, or responsible therefor, and such application shall set forth the desired route along which such parade or procession is to proceed, the desired time of starting, the duration, and the name of the person or society in control thereof, or responsible therefor, and the purpose of such parade or procession; and, in case of an open-air meeting, such application shall specify the place at which it is desired to hold such meeting, the purpose thereof, and the name of the person or society in control thereof, or responsible therefor, the time at which such meeting is to be held and the probable duration thereof. Upon such application being made, the superintendent of police, when necessary, shall investigate or cause to be investigated the person or society making such application and the truth of the statements made in such application regarding the purpose or object of such parade, procession or open-air meeting.

This ordinance is similar to the ordinance at issue in the *Shuttlesworth case*, No. 42, argued in this Court on November 18, 1968.